



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC JR NO E001 OF 2020

REPUBLIC.....APPLICANT

MOI TEACHING AND REFERRAL HOSPITAL.....EX APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD THE

CONSORTIUM OF RENTO AFRICA LTD.....1<sup>ST</sup> INTERESTED PARTY

PHARMAKEN.....2<sup>ND</sup> INTERESTED PARTY

**REASONS FOR THE RULING DATED 28<sup>TH</sup> APRIL 2021**

Pursuant to the provisions of section 1A, 1B, and 3A of the Civil Procedure Act, Order 53 Rule 3 of the Civil Procedure Rules and article 156 of the 2010 Constitution of Kenya; the *ex parte* applicant has sought the following orders.

- 1. An order declaring that the Office of the Attorney General cannot represent the respondent without a conflict of interest arising.**
- 2. An order directing the Office of the Attorney General to recuse itself from representing the respondent.**
- 3. An order be issued expunging the pleadings filed by the Office of the Attorney General in Judicial Review No. 1 Of 2020.**
- 4. An order directing that costs of the application be borne by the respondent.**

The application is based on the following grounds. The Attorney General is the principal legal adviser of the government as set out in article 156 of the 2010 Constitution of Kenya. The Attorney General has entered appearance for the Public Procurement Administrative Board in the instant application; in which Moi Teaching and Referral Hospital is the ex applicant. The said hospital being a state corporation is entitled to representation and advice from the Office of the Attorney General. The Office of the Attorney General cannot purport to act for one agency against the other without conflict of interest.

Furthermore, the Attorney General being a state officer ought to perform his duties with objectivity and impartiality as required by article 73 of the 2010 Constitution. Additionally, there is a likelihood of mischief and prejudice against the *ex parte* applicant if the Attorney General does not recuse himself, since he issues operational directives to all state corporations and agencies from time to time. The Head of the Public Service issued a circular reference No. OP/CAB 1A dated 11<sup>th</sup> November 2019 in which he directed all state agencies to submit any court cases between them and other state agencies relating to disputes arising from projects or programmes funded through government resources in favour of mediation facilitated by the Office of the Attorney General.

In addition to the foregoing grounds in support of the application, the application is supported by the 24 paragraphs supporting affidavit of the *ex parte* applicant's chief executive officer (Dr. Wilson K. Aruasa); whose major averments are as follows.

The *ex parte* applicant is a state corporation, established vide Legal Notice No. 78 of 1998 under the State Corporations Act (Cap 446) Laws of Kenya.

The respondent is a tribunal formed under the Public Procurement and Asset Disposal Act, 215.

The *ex parte* applicant has filed a judicial review application to challenge the decision of the Public Procurement Administrative Review Board (herein after referred to as PPARB) in PPARB Application No. 133 of 2020 and the PPARB Application No. 140 of 2020.

The *ex parte* applicant has engaged an in-house advocate to represent it in these proceedings.

Furthermore, the chief executive officer has deposed that the representation of the respondent by the Attorney General means that that is the government position on the matter. Further, the Attorney General should be independent in promoting, protecting and upholding the rule of law and depending the public interest.

The deponent has further deposed that under the Office of the Attorney General Act (Cap 49) Laws of Kenya in section 24 (1), all state counsel are required to subscribe to and observe the Code of Conduct which is set out in the Schedule to the Act, in particular paragraph 16 (b) (i) provides that all state counsel shall not appear, advise or represent any party against the government.

The Attorney General has further issued directions to state corporations on how to defend or seek legal representation in court, which directions were sent to all cabinet and principal secretaries.

The other matters that the deponent has deposed to are set out as grounds in support of the application and I will not replicate them herein.

### **The *ex parte* applicant's submissions**

Mr. Kirima, counsel for the *ex parte* applicant has framed issues for determination in his submissions.

He has submitted that the Attorney General's office has not handled this application with objectivity and integrity for he cannot represent one state agency against the other, in view of the circular of the Head of the Public Service being Circular Ref. Number OP/CAB 1A. According to that circular all disputes arising from projects or programmes funded by the Government should be subjected to mediation that is facilitated by the Office of the Attorney General (herein after referred to as OAG). It is therefore the submission of counsel that since the Attorney General (herein after referred to as (A.G) is not elected he is not the ultimate source of public authority even concerning the law. In support of the foregoing proposition counsel has cited the decision of the USA court (*Bronson, J*) in *State ex rel. Ameraland v Hagan, 44 N.D. 306, 175 N.W. 372 (N.D. 1919)*. In that case the court observed that although the A.G. is the general and legal advisor of the various offices of the state government and does represent them in court, it does not mean that his position is that of an attorney to a client, whose duty is to wholly direct the defence and legal steps to be taken in opposition or contrary to the demands of his client or the officer or department concerned.

Based on the circular of the Head of the Public Service, counsel has submitted that the A.G. through his state counsel who appeared for the Respondent herein is defying the decision of the Presidency to subject all disputes involving state agencies to mediation to save public resources (money, personnel and documents, etc). Additionally, counsel has submitted that the state counsel on record placed himself on record as representing the respondent without consulting the A.G. this gives to rise to a serious conflict of interest. Counsel has also submitted that the A.G.'s conduct is in breach of article 73 of the 2010 Constitution of Kenya; which is in relation to responsibilities of leadership of a state officer in particular the requirement of objectivity and impartiality in decision making. Such decision should not be influenced by nepotism, favouritism and other improper motives or corrupt practices.

Again, based on Rule 3 of the Law Society of Kenya Code of Conduct for Advocates 2016, counsel submitted that an advocate is required to provide legal services competently, diligently and ethically. Counsel further cited Rule 6 of the Law Society of Kenya Code of Conduct for Advocates 2016, and submitted that that rule provides for professional independence to advocates in private practice as well to in-house counsel including a state counsel in the OAG. Counsel also pointed out that the objectivity and detachment of an in-house counsel may be compromised by the employee-employer relation.

Furthermore, counsel has cited chapter 6 and article 73 of the 2010 Constitution of Kenya, which are in relation to leadership and integrity in the public service and has submitted that the conduct of the A.G. has not promoted public confidence in the integrity of his office.

Additionally, counsel has submitted that the conduct of the A.G. will cause discontent and dissatisfaction to the *ex parte* applicant as well as prejudice. It will also deny it governmental (A.G.) legal representation with the result that it will cause havoc in the state agencies with some running to the A. G. for legal advice while others will face it in court. And for this reason, counsel has invited the court to intervene and rectify.

Counsel has further submitted that the first duty of the A. G. when confronted with a conflict of interest among his clients is to refer the dispute to the Head of Public Service for mediation and resolution.

Counsel has also submitted that the *ex parte* applicant and the respondent are state agencies who are equally entitled to representation by the OAG.

Counsel has further cited Legal Notice No. 73 of 1998 issued pursuant to the State Corporations Act (Cap 446) Laws OF Kenya as the legal statute under which the *ex parte* applicant was established.

He has also cited section 5 of the OAG Act, which mandates the OAG to advise government ministries, departments, constitutional commissions and state corporations on legislative and other legal matters. In support of his submission, counsel has cited the decision of this court (Lenaola, J) in *Okiya Omtatah Okioti v Attorney General [2013] e-KLR*, in which that court observed that the 2010 Constitution created a structure of governance that has many institutions that draw their funds from the tax payer and the law has not stopped them from seeking legal advice and representation by the A.G. at no cost.

Counsel has further submitted that the ex parte applicant has been forced by the circulars from the A. G. and Head of the Public Service to budget for and hire in-house counsel; but this has not prevented the ex parte applicant from seeking legal advice and representation by the A.G.

Based on the Law Society of Kenya, Code of Conduct 2016, and the Law Society Code of Standards of Professional Practice and Ethics (SOPPEC) June 2016, paragraphs 4 and 6, counsel submitted that these provisions apply to the OAG and has further submitted that the A.G. has not acted with objectivity and impartiality, “while knowing that if this matter progresses to the Court of Appeal or the Supreme Court it will be required to either Defend the Ex parte Applicant (considering its internal legal representatives do not have the necessary expertise to handle litigation at such levels) or grant approval for it to hire external legal representation as per its circular Ref No. AG/CONF/6/D/144 VOL.XI.” Counsel has also cited *In Serve In Love Africa (Sila) Trust v David Kipsang Kipyego & Others [2017] e-KLR*, in which the court observed that a conflict of interest will be deemed to arise when an advocate is serving or attempts to serve two or more interests which are not compatible and in the process fails to observe the fiduciary duty owed to the clients and to the former clients. That court went further and stated that the four elements of fiduciary duty are:

- 1. The duty of loyalty to the client.**
- 2. The duty of confidentiality.**
- 3. The duty to disclose to the client or put at the client’s disposal all the information within your knowledge that is relevant in order to act in the client’s best interests.**
- 4. The duty not to put your own or anyone else interest before those of the client.**

He has therefore submitted that when the A.G. appears for the Respondent, there is an incompatibility between the interest of both the Respondent and the ex parte applicant.

Counsel has further submitted that the OAG is conflicted in terms of trying to serve two interests at the same time in offering legal advice to all state agencies, mediating their disputes and in determining how and when to procure legal representation and in representing the state agencies in court.

In addition to the foregoing, counsel has cited *Delpis Bank Ltd v Chatt & 6 others (2005) 1 KLR*, which has also been cited by the respondent.

Counsel has also cited the USA state court decision in *Attorney General v Public Service Comm 243 Mich. App. 487 (Mich. Ct. App. 2000)*, in which that court held that “if the Attorney General chooses to stand in opposition to a state agency or department as an actual party litigant and yet simultaneously attempts to represent that state agency in litigation, such dual representation creates a conflict of interest that must be addressed and rectified. Moreover, contrary to the Attorney General’s assertion that her duty to serve the public interest requires dual representation under the present circumstances, we conclude that the obvious conflict of interest in fact interferes with her ability to fulfill such obligations. State departments, officers and agencies deserve adequate legal representation free of conflict.....dual representation is permissible if “the lawyer reasonably believes the representation will not adversely affect the relationship with the other client” and each client consents [to dual representation] after consultation.”

Furthermore, counsel has submitted that the “*conflict of interest arises when the OAG represents the respondent against the Ex parte Applicant after issuing directions that all state agencies should utilize the in-house counsel before seeking representation from the A.G. or external Advocates.*”

The second issue raised by counsel for the ex parte applicant is that the OAG issues operational directives to all state agencies, which is evidenced by his circular Ref. AG/CONF/6/D/144 VOL. XI in respect of guidelines to such agencies in seeking legal representation.

Further, the circular of the Head of the Public Service Ref. Circular OP/CAB/1A directed all state agencies to submit any court cases between them and other agencies relating to disputes arising from projects or programmes funded through government resources in favour of mediation that is facilitated by the OAG.

Based on the decision of this court *Amina N. Raso & 3 Others [2017] e-KLR*, citing with approval the English case of *Rakusen v Ellis, Munday and Clarke [1912] 1 CH 831 page 840*, counsel submitted that this court has jurisdiction to disqualify an advocate from disclosing his client’s secrets. Furthermore, based on *Francis Mugo & 22 Others v James Bress Muthee & 3 Others [2005] e-KLR*, counsel submitted that the A.G. should have declined the brief of the respondent because the OAG may be required as a witness in this application and the subsequent suits in the appellate courts.

Further, counsel cited Halsbury’s Laws of England, vol 3 at page 626 the issue of conflict of interest was addressed as follows: “*Counsel ought not to appear for two clients whose interests may conflict and should refuse to accept a brief if he has advised another person on the same matter or if he is in possession of confidential information relating to the opposing party or by reason of his relationship with a party to or a witness in the proceedings, or if it is likely that he will be a witness in the same proceedings.*”

Finally, counsel has submitted that the pleadings of the AG should be expunged from the record because the AG has represented the respondent against another state agency in which he should disqualify himself as well.

Counsel has therefore urged the court to dismiss the application with cost to be borne by the respondent board.

### **The case for the respondent**

The respondent (the Public Procurement Administrative Review Board) has filed a 29 paragraphs replying affidavit through its acting secretary (Philip Okumu) in opposition to the substantive notice of motion application dated 23<sup>rd</sup> December 2020. The major relevant paragraphs to the recusal application are as follows.

The deponent has deposed that he has sought the advice of the state counsel who has the conduct of the instant matter on behalf of the Hon. Attorney General.

The deponent has deposed that the applicant's termination of the subject procurement proceedings failed to meet the substantive and all procedural requirements of termination of a tender pursuant to section 63 of the Public Procurement and Asset Disposal Act. Further, the respondent board had jurisdiction to entertain the substantive application and determine the appropriate reliefs to issue in Review No. 140 of 2020.

Furthermore, the deponent has deposed that section 75 (1) of the act requires a person aggrieved by a decision made by the Respondent to seek judicial review in the High Court within 14 days from the date of the respondent's decision, failing which the decision of the Respondent shall be final and binding upon both parties. He has further deposed that the *ex parte* applicant had not lodged an application for judicial review and as a result the decision of the Respondent had become final. The deponent has finally deposed that the respondent expunged the preliminary re-evaluation findings captured in the report dated 4<sup>th</sup> November 2020 emanating from an unlawful re-evaluation conducted in breach of the orders of the Respondent and directed the *ex parte* applicant's accounting officer to comply with the orders issued in Review No. 133 of 2020 within 14 days from 27/10/2020.

### **The Respondent's submissions**

The Hon Attorney General through Mr. M.W. Odongo, HSC, has filed written submissions in opposition to the application.

The respondent has opposed the application on the following major grounds. First, the application is a delaying tactic and an abusive of the court process as the *ex parte* applicant did not seek the recusal of the Office of the Attorney General (herein after referred to as OAG) in Eldoret High Court Misc JR No. E002 OF 2020, a matter which has been determined on merit by the instant court. Second, every party has a right to legal representation to counsel of his choice. Third, the OAG neither acted for the *ex parte* applicant nor rendered any advisory or guidance in respect of the impugned procurement; hence no advocate/client fiduciary relationship can be implied. Fourth, OAG holds no confidential information over the impugned procurement; hence it is not a potential witness in the dispute before court. Fifth, there is no advocate/client fiduciary relationship with the *ex parte* applicant as the OAG's was instructed to act for the Respondent. Sixth, there is no material placed on record to warrant the disqualification of the OAG or any of the state counsel engaged herein.

Seventh, as regards the Attorney General's circular, counsel has submitted that the said circular is merely facilitative for it guides state corporations to utilize in-house counsel before resorting to engaging an external counsel.

Eighth, OAG is not in violation of the circular by the Head of Public Service whose import was merely to reduce litigation between state organs. Counsel also submitted that article 50 (2) (g) of the Constitution of Kenya allows each party to be represented by its counsel and that no prejudice will be visited upon the *ex parte* applicant.

Furthermore, counsel submitted that the issue as to whether the OAG should be disqualified from representing one state corporation against another is a matter to be resolved on a case-to-case basis. In this regard, based on the Court of Appeal decision in *Delpis Bank Ltd v Chatt & 6 others (2005) 1 KLR*, counsel submitted that the right to counsel of one's choice may only be limited where there is a conflict of interest and where the principle of confidentiality in advocate/client fiduciary relation is endangered or where the advocate would double up as a witness. In that case also the court observed that there is no general rule that an advocate cannot act for one party and then act for the opposite party in subsequent litigation and that the test is whether real mischief or real prejudice will in all human possibility result.

Rule 9 of the Advocates Practice Rules restates the same principles as observed in the immediate foregoing Court of Appeal decision.

Based on the foregoing authority counsel has submitted that while the *ex parte* applicant and Respondent may be entitled to legal representation from the OAG, that right is not absolute and may be limited if circumstances so dictated.

Counsel has also submitted that although the OGA is also the *ex parte* applicant's potential advocate does not necessarily mean that the OAG should be disqualified.

Counsel further submitted that the *ex parte* applicant has not demonstrated that the OAG was privy to or participated in the subject procurement process through the provision of advice or guidance. Additionally, it was not demonstrated that the OAG was ever instructed to act for the *ex parte* applicant in the procurement process and that the OAG did not receive any confidential information from the *ex parte* applicant in the course of the procurement process.

Counsel has submitted that the contention of the *ex parte* that there is an implied duty the OAG shall represent all state corporations in courts and tribunals by virtue of the OAG being the principal Government adviser, is not correct in law as each case must be decided on its peculiar circumstances.

It is also the submission of counsel that state corporations who intend to be represented by the OAG have to make applications. The rationale behind this is that it provides the OAG a filter mechanism to ensure that full-fledged corporations are encouraged to use their own in-house counsel, thus releasing the OAG to represent ministries and departments who do not have capacity to engage external counsel.

Furthermore, the OAG Act empowers Hon Attorney General to give general policy guidance in respect of how state corporations ought to be

represented efficiently and effectively at minimum cost. This, according counsel explains the guidance contained in the circular dated 3/11/2020 and issued by the Hon. Attorney General, which required corporations to optimally use in-house counsel and only resort to retention of external advocates in exceptional cases and subject to the consent of the Attorney General.

Counsel has submitted that the *ex parte* applicant has not been discriminated against as alleged because the said ex applicant did not request for legal representation.

Furthermore, counsel has submitted that the fact that the OAG renders legal advice does not in itself establish any fiduciary relations in respect of the subject matter before the court.

Based on *Kings Woolen Ltd (formerly known as Manchester Suiting Division Ltd) & Another v M/s Kaplan & Stratton Advocates (1993) KLR 273*, counsel submitted that it is trite law that only a retainer creates advocate/client fiduciary relationship and that it is only such a situation that debars an advocate from acting for the opposing party.

Again, counsel cited *William Audi Ododa & another v John Yier & Another, CA No. NAI 360 of 2004 (UR)* in which the court observed that the Constitution does not provide for the right to legal representation **in civil matters** as it does in criminal matters, but it is implied.

Furthermore, counsel has submitted based on Nairobi Civil Appeal No. EO39 OF 2017 in the case of *Arprim Consultants v Parliamentary Service Commission & Others*, in which the Court of Appeal held that a judgement delivered by the High Court outside the mandatory time-lines as provided for in section 75 of the Public Procurement and Asset Disposal Act is a nullity *ab initio* and therefore this court lacks jurisdiction to continue in determining this application.

Counsel has therefore urged the court to dismiss the application with costs to the respondent.

### **The submissions of the 1<sup>st</sup> Interested party**

Mr. Muganda, counsel for the 1<sup>st</sup> Interested party, has submitted that this court lacks jurisdiction to entertain and determine the instant application. He cited section 175 (3) and (5) of the Public Procurement and Asset Disposal Act, 2015 (herein after referred to as PPADA), which mandatorily requires the High Court to determine an application made to it from the decision of the Respondent within 45 days; failing which the decision of the Respondent shall be final. Section 175 (4) and (5) of the PPADA allows an aggrieved party to appeal to the Court of Appeal within seven days and the Court of Appeal is also mandatorily required to make a decision within 45 days, which decision shall be final.

Counsel further submitted that if either the High Court or Court of Appeal fails to make a decision within the prescribed time lines, the decision of the Respondent shall be final and binding upon the parties. Further counsel cited *Arprim Consultants v Parliamentary Service Commission & Others, supra*, in which the Court of Appeal (Okwengu, Kiage and Sichale, JJA) held that a judgement issued by the High Court or Court of Appeal outside the statutory timelines is not binding upon the parties.

Based on the foregoing, counsel submitted the decision of the Public Procurement and Assets Disposal Review Board (herein after referred to as PPARB) in PPARB No. 140 of 2020 is final and binding upon the parties. Counsel has therefore submitted that this court lacks jurisdiction. He therefore urges the court to down its tools.

Furthermore, counsel has also submitted that the *ex parte* applicant has conveniently and by design misunderstood the position and nature of the parties to the instant dispute. According to counsel the *ex parte* applicant is a state agency with a budget and the option to outsource legal representation; while the Respondent is a government institution with no option to get legal representation from anywhere else other than from the OAG. The orders sought by the *ex parte* applicant if granted will leave the respondent without legal representation, which is an integral component of access to justice.

Furthermore, counsel has submitted that the instant judicial review proceedings are not between two government agencies. The 1<sup>st</sup> Interested party is a private entity, enjoined to these proceedings by virtue of having emerged as the successful party tenderer in the instant dispute in which the *ex parte* applicant is the procuring entity; while the Respondent is a tribunal that is mandated to hear and determine disputes such as the instant matter. Based on the foregoing, counsel has submitted that the governmental circulars being Ref. AG/CONF/6/D/144 VOL. XI dated 3<sup>rd</sup> November 2020 and Ref. Number OP/CAB 1A dated 14<sup>th</sup> November 2019 do not apply to the Respondent and the 1<sup>st</sup> Interested party.

Additionally, counsel has further submitted that it is the *ex parte* applicant who moved to court in the instant judicial review proceedings and in doing so it was violating the directions in circular Ref. Number OP/CAB 1A, which circular does not prohibit the A.G. from representing a state agency which has no option of outsourcing for legal representation. Moreover, if the *ex parte* applicant were to strictly follow the directions of the said circular then it would withdraw the instant case and forward it for mediation.

Counsel has also submitted that the term conflict of interest and in particular the constitutive elements of the fiduciary duty have been defined in *In Serve In Love Africa (Sila) Trust v David Kipsang Kipyego & Others, supra*, and do not intend to reproduce it here. Furthermore, counsel also cited *Tom Kusienya & Others v Kenya Railways Corporation & Others [2013]e-KLR*, in which the principles concerning conflict of interest were reiterated by this court (Mumbi, J); only that it additionally stated that Rule 9 of the Advocates (Practice Rules) does not prevent an advocate from testifying whether orally or by way of an affidavit on formal or non-contentious matters of fact, in which he acts or appears. That court also noted that “*The test which has been laid down in authorities applied by this court is whether real mischief or real prejudice will in all human probability result.*”

Furthermore, counsel has submitted that an advocate can only be barred from acting if he would be required to give evidence in a matter

orally or by way of an affidavit. In the instant matter the A.G. has not acted previously for either party nor has he been privy to privileged or confidential material from either party.

Counsel also submitted that the conflict of interest anticipated under section 12 of the Public Officer Ethics Act as read with article 73 () of the 2010 Constitution of Kenya is conflict of interest where the personal interests of an officer conflicts with that of his official duties.

Based on *Dorothy Seyanoi Moschion v Andrew Stuart & Another [2014] e-KLR*, counsel submitted that the right to legal representation should not be denied without weighing all the circumstances of the case and that it is not enough for the applicant to say that he intends to call counsel as a witness.

Counsel has also submitted that the ex parte applicant appeared before the Respondent and submitted to its jurisdiction in PPARB before deciding to apply judicial for review of the decision in the High Court with representation from the A. G. Similarly, the ex parte applicant in JR No. 002 of 2020 filed an application before this court, and no disqualification of the A. G. was made in JR 002 OF 2020, which was heard and determined by this court on merit. Counsel has left the matter to the court to draw its inference on the conduct of the ex parte applicant.

Counsel has also submitted that the Respondent has a right of access to justice and to legal representation by virtue of 48 of the 2010 Constitution of Kenya and the right to a fair hearing by virtue of article 50 of the same constitution. He has therefore submitted that to deny the Respondent the right to legal representation would seriously infringe on the Respondent's right to legal representation and on his right to a fair hearing.

Counsel has submitted that the purpose of the OAG Act is to ensure that state agencies do not lack legal representation in any matter they are a party. This he submits is based on section 7 (1) of the OAG Act, which reads as follows: "...*Despite the provisions of any written law to the contrary or in the absence of any other law, the Attorney General shall have a right of audience in proceedings of any suit or inquiry of an administrative body which the Attorney General considers to involve the legislature, the judiciary or an independent department or agency of the Government...*"

Counsel has finally urged the court to reject the invitation to expunge the Respondents pleadings from the record; since the ex parte applicant has failed to place before the court any evidence to show that there is conflict of interest on the part of the A.G. Counsel has added that the pleadings are sworn to by the respondent and not the A.G.

He has therefore urged the court to dismiss the application with costs.

### **Issues for determination**

I have considered the affidavits of the parties and their detailed submissions including the authorities they cited. As a result, I find the following to be the issues for determination.

- 1. Whether the court has jurisdiction to determine the recusal application in respect of the A.G.**
- 2. Whether the ex parte applicant has made out a case for the grant of the orders sought.**
- 3. Whether the pleadings of the Respondent should be expunged.**
- 4. Who bears the costs of this application?**

### **Issue 1**

Both counsel for the Respondent (Mr. Odongo) and the 1<sup>st</sup> Interested party (Mr. Muganda) submitted that this instant court lacks jurisdiction to determine the matter because the Court of Appeal in *Arprim Consultants v Parliamentary Service Commission & Others, supra*, held that a judgement delivered by the High Court outside the mandatory time-lines as provided for in section 75 of the Public Procurement and Asset Disposal Act is a nullity *ab initio*. This court was informed that the reasons for that judgement are due for delivery on the 12<sup>th</sup> May 2021.

Before this court is an interlocutory application, while the judgement referred to by the Respondent and the 1<sup>st</sup> Interested party relates to judgement on the merit of the substantive notice of motion. The substantive motion in the instant matter has not been heard; for it is still pending for hearing. In the circumstances, I found that the Court of Appeal judgement is inapplicable in the instant application. I therefore found that I had jurisdiction to determine this interlocutory application.

In the premises, I answer the first issue in the affirmative.

### **Issue 2**

The main issue before me is whether there is in a conflict of interest arising out of the legal representation of the Respondent by the OAG. The circumstances in which a conflict of interest may arise was aptly summarized and addressed in the authority cited by Mr. Kirima, namely, *Halsbury's Laws of England*, vol 3 at page 626, which is as follows:

"Counsel ought not to appear for two clients whose interests may conflict and should refuse to accept a brief if he has advised another person on the same matter or if he is in possession of confidential information relating to the opposing party or by reason of

his relationship with a party to or a witness in the proceedings, or if it is likely that he will be a witness in the same proceedings.”

It is clear that a conflict of interest may arise if counsel appears for two clients whose interests are in conflict. This raises the issue as to whether the ex parte applicant is the client of the AG.

I find that there is no evidence that the A.G. was involved in the tendering process. On the affidavit evidence I also find that the A.G. was not privy to any information concerning the instant subject matter. He only entered appearance for the Respondent after he was instructed to represent the Respondent. I find that there is absolutely no evidence that the A.G. is the advocate of the ex parte applicant.

I further find that there is no merit in the submission of Mr. Kirima that there is conflict of interest solely by virtue of the legal representation of the Respondent by the A.G. The USA authority cited by Mr. Kirima does not support his submission. That authority merely stresses that the A.G. is not an ordinary advocate for “*it does not mean that his position is that of an attorney to a client, whose duty is to wholly direct the defence and legal steps to be taken in opposition or contrary to the demands of his client or the officer or department concerned.*” I understand this to mean that he represents the public interest whenever he appears in any suit. He is not an ordinary advocate (attorney).

Additionally, the ex parte applicant is a body corporate with its own legal personality since it can sue and be sued in its own right by virtue of section 3 (2) (a) (b) and (c) of the State Corporations Act (Laws of Kenya). It was established as a corporation pursuant to vide Legal Notice No. 78 of 1998 under the State Corporations Act (Cap 446) Laws of Kenya. And for that reason it has a right to be represented by its in house lawyer or external advocates without seeking approval from the A.G. The A.G.’s right to represent national Government entities does not include procurement of legal services for other Government entities according to the High Court (Nyamweya, J) in *Republic v. Attorney General, Law Society of Kenya (Interested Party), ex parte Francis Moriasi, Nairobi HC JR Misc App No. 364 of 2018*. It therefore follows that the ex parte applicant has its own board which runs its affairs; and notwithstanding governmental funding, the A.G. is bound to treat it as an independent body. The A.G. is bound by law to appear for the Respondent for it is an administrative review board of the national Government; unless there is demonstrated by way of evidence that there is conflict of interest by virtue of that representation.

Mr. Kirima for the ex parte relied on the circulars from the Head of the Public Service (being circular Ref. Number OP/CAB 1A) and another from the A. G. (being circular AG/CONF/6/D/144 VOL. XI), which in his view barred the A.G. from acting for the Respondent. I find that both circulars cannot per se prevent the A.G. from acting for the Respondent; since there is no conflict of interest in the A.G. acting for the Respondent.

I further find that it is not the function of this court to decide whether the A. G. through his state counsel is defying the circular issued by the Head of the Public Service that directed the A.G. to refer to mediation all disputes arising from projects or programmes funded by the Government. The reason for this is that by virtue of the division of governmental powers into three branches namely the executive (Presidency), the judiciary and legislature, the court is not allowed to intervene unless the directive interferes with the fair trial rights of a party. In the instant application the ex parte applicant is seeking to deny the Respondent access to justice by seeking an order that the A. G. should be disqualified from acting for the Respondent. In the instant application, it is the ex parte applicant who is attempting to interfere with the right of legal representation of the Respondent without any justification. The right to legal representation cannot be taken away lightly. There has to be a demonstration to the satisfaction of the court that the move is warranted; which is lacking in this application.

Moreover, the circular from the Head of the Public Service merely requires the A.G. to subject to mediation disputes involving governmental agencies; which the A.G. is to facilitate. I agree with Mr. Muganda that the 1<sup>st</sup> interested party is not a governmental agency and is not therefore covered by that circular. I further find that it is the ex parte applicant who filed a review application, instead of seeking mediation of the dispute. The ex parte applicant is now seeking an order in its favour based on its breach of the directives of that circular.

Mr. Kirima has further submitted that the A.G. through his state counsel is defying the circular of the Head of Public Service; which he submits is binding upon him; since he not elected. I decline this invitation to intervene and determine whether it is so or not; since it is an intra-executive affair (that is between the A.G. and the Presidency). And by virtue of the separation of powers, the law does not allow this court to intervene. The court may only intervene if the constitutional and other rights of a party are affected. Additionally, this is an academic or moot point that is for other forums and not this court.

In the circumstances I find no merit in his submissions, which I hereby reject.

An applicant who seeks the disqualification of an advocate from acting for a party in court must demonstrate the existence of the following factors.

First, the applicant has to demonstrate that there is a conflict of interest in that the advocate sought to be disqualified is required as a witness, in the same matter having acted for one of the parties previously. In this regard, I find as persuasive *Delpis Bank Ltd v Chatt & 6 others, supra*. In the instant application the ex parte applicant is the principal in terms of client-advocate privilege in terms of section 134 of the Evidence Act and should have disclosed to this court the anticipated evidence that he intends to obtain from the A. G. The ex parte applicant is not allowed to wait, to produce evidence as the application progresses to the Court of Appeal and the Supreme Court. The ex parte applicant has a right to waive the privilege of its advocate to enable the latter to disclose the nature of the intended evidence in terms of section 136 (2) of the Evidence Act (Cap 180) Laws of Kenya.

Additionally, the submission of the ex parte applicant is speculative in nature for it anticipates to produce evidence in future as the application progresses to those superior courts of record. It is trite law that a court of law must base its decision on the evidence produced before it. That evidence is lacking in this application and for that reason I hereby dismiss the application for lacking in merit.

However, if the anticipated evidence (oral or by way of an affidavit) from the advocate sought to be disqualified is non-contentious or is formal, that may not be a ground for disqualification. In this regard, I find as persuasive the decision in *Tom Kusienya & Others v Kenya Railways Corporation & Others, supra*. Furthermore, the ex parte applicant has not demonstrated by way of evidence that it requires the

A.G. as a witness. There is not even the slightest indication in its supporting affidavit in that regard.

Second, the existence of a retainer creates advocate/client fiduciary relationship. And in such a situation an advocate may be disqualified from acting for the opposing party. I find as persuasive the decision of the court in *Kings Woolen Ltd (formerly known as Manchester Suiting Division Ltd) & Another v M/s Kaplan & Stratton Advocates, supra*, in that regard. There is no evidence that the A.G. has been retained by the ex parte applicant.

Third, counsel ought not appear to for two clients whose interests may conflict and should refuse to accept a brief if he has advised another person on the same matter or if he is in possession of confidential information relating to the opposing party or by reason of his relationship with a party as clearly set out in Halsbury's Laws of England, Vol 3 at page 626; which I equally find to be persuasive. In this regard, I find that the ex parte applicant has not produced evidence to show that the A.G. has in his possession confidential information relating to it.

Furthermore, it is instructive to note that in JR No. E002 of 2020, which involves the same parties the ex parte applicant, did not raise the issue of disqualifying the A.G. from acting for the Respondent therein. I find that the disqualification of the A.G. in the instant application is an afterthought. And for that reason I hereby reject it for lacking in merit.

Furthermore, I find that the A.G. is not acting breach of the provisions of article 73 of the 2010 Constitution, which relates to leadership and integrity of the public officer in the discharge of his mandate in the public service. Again, the ex parte applicant has failed to produce evidence of conflict of interest. He has also failed to demonstrate that the existence of those two circulars have adversely affected the fair trial legal rights of the ex parte applicant. I therefore reject the submission of counsel for lacking in merit.

### **Issue 3**

The pleadings and evidence sought to be expunged is that of the Respondent. I have found that there is no conflict of interest in the representation of the Respondent by the A. G. The A.G. is properly on record. Even if I were to find that he is not properly on record, in principle, it would not be proper to expunge the affidavit evidence of the Respondent sworn to by the Respondent's acting secretary (Philip Okumu), which is personal to its secretary. I therefore decline to grant an order for expungement of the Respondent's pleadings with the result that I hereby dismiss the ex parte applicant's submission in that regard.

### **Issue 4**

I awarded costs to the Respondent and the 1<sup>st</sup> interested party to fully or partially indemnify them for the costs they incurred in prosecuting this application. See *Peter Muriuki Ngure v Equity Bank (K) Ltd [2018] e-KLR*.

**REASONS FOR THE RULING DATED 28<sup>TH</sup> APRIL 2021 SIGNED, DATED AND DELIVERED THROUGH THE E-MAIL ADDRESSES OF COUNSEL FOR THE PARTIES THIS 13<sup>TH</sup> DAY OF MAY 2021 AT KAPENGURIA.**

**J M. BWONWONG'A**

**JUDGE**